

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the complaint of)	
THE DETROIT EDISON COMPANY against)	
AMERITECH MICHIGAN regarding the)	Case No. U-12900
attachment of communications equipment and)	
facilities to electric poles.)	
_____)	
)	
In the matter of the complaint of)	
AMERITECH MICHIGAN against)	Case No. U-13251
THE DETROIT EDISON COMPANY.)	
_____)	

At February 25, 2002 meeting of the Michigan Public Service Commission in Lansing,
Michigan.

PRESENT: Hon. Laura Chappelle, Chairman
Hon. David A. Svanda, Commissioner
Hon. Robert B. Nelson, Commissioner

ORDER CONSOLIDATING COMPLAINT CASES

On April 5, 2001, The Detroit Edison Company (Detroit Edison) filed a complaint against Ameritech Michigan in Case No. U-12900. The complaint alleges that Ameritech Michigan unilaterally attached its wires and other facilities to Detroit Edison's electric utility poles in violation of provisions of the National Electrical Safety Code (Code) that the Commission adopted by reference in R 460.813. The complaint requests a Commission determination relieving Detroit Edison of an obligation to supply power to new communications equipment and facilities unless Ameritech Michigan cures existing Code violations, agrees to comply with the Code prospectively, and agrees to indemnify Detroit Edison for the joint use of electric poles. Detroit Edison and

Ameritech Michigan have filed testimony as scheduled, and testimony on behalf of the Commission Staff (Staff) and rebuttal testimony, if any, are due in March 2002. The testimony will be subject to cross-examination at a hearing scheduled for April 17, 2002.

Contemporaneous with the complaint before the Commission, Ameritech Michigan filed a civil complaint in the Oakland County Circuit Court against Detroit Edison (Docket No. 01 030537 NZ). The civil complaint alleges three counts as theories for liability: (1) Detroit Edison has refused to supply power to Ameritech Michigan's new communications facilities in violation of Michigan law and the utility's tariffs; (2) the refusal violates Detroit Edison's franchises with various municipalities and Ameritech Michigan is entitled to relief in contract as a third-party beneficiary; and (3) the refusal to supply power violates a duty in tort not to interfere with Ameritech Michigan's present and prospective business relationships with its customers. The fourth and fifth counts request declaratory and injunctive relief, respectively, to ensure a continuous supply of power.

In an order entered on October 26, 2001, the Court granted partial summary disposition disposing of counts (1) and (3). It ruled that it should defer to the Commission on count (1) as a matter of primary jurisdiction. It dismissed count (3) on the ground that any duty arose solely out of the contractual relationship between Ameritech Michigan and the utility, so that the count was derivative of the first count. The Court retained jurisdiction over count (2), but it indicated that it would stay proceedings pending the outcome of Commission proceedings, which would probably resolve count (2). In another order entered on December 14, 2001, the Court expressed concern regarding outstanding safety issues raised by the complaint and directed Ameritech Michigan to file a complaint before the Commission by the end of the week.

On January 8, 2002, Ameritech Michigan filed a complaint against Detroit Edison before the Commission in Case No. U-13251.¹ The complaint states its claims in seven substantive counts: (1) by refusing to extend electric service, Detroit Edison violated its duty to serve under Michigan law and its tariffs; (2) by threatening to withhold pole attachments, Detroit Edison is violating its duty to provide the pole attachments pursuant to MCL 460.6g; (3) the Commission should conduct an inspection or review of alleged Code violations with the joint participation of Ameritech Michigan and Detroit Edison; (4) Detroit Edison has itself violated the Code; (5) Detroit Edison is seeking to impose conditions on its regulated electric and pole attachment services in violation of its Commission-approved Code of Conduct; (6) Detroit Edison's refusal to provide electric service violates the Customer Choice and Electricity Reliability Act, MCL 460.10 et seq.; and (7) Detroit Edison's noncompliance with the Code and its tariffs violates MCL 460.55 and 460.558. An eighth count requests a declaratory ruling. The complaint requests the following forms of relief: (1) order Detroit Edison to provide electric service to existing and new Ameritech Michigan facilities; (2) order Detroit Edison to provide pole attachments; (3) provide for advance notice to Ameritech Michigan and joint participation by both parties when Detroit Edison conducts field inspections of attachments on its poles; (4) require Detroit Edison to disclose instances in which it has removed and reattached Ameritech Michigan facilities at poles that are allegedly not in compliance with the Code; (5) compel good faith negotiations of a new joint use agreement; (6) prohibit Detroit Edison from making false or unsubstantiated assertions regarding Ameritech Michigan's pole attachments; (7) impose statutory fines per offense for each day of noncompliance; and (8) order Detroit Edison to cease and desist from further violations.

¹ The filing date of the complaint followed several attempts by Ameritech Michigan to present the issues for resolution in Case No. U-12900.

On January 16, 2002, Ameritech Michigan filed a motion to consolidate the two complaint dockets and to revise the schedule accordingly. On January 23, 2002, Detroit Edison filed a response. At a motion hearing on January 24, 2002, Administrative Law Judge Barbara A. Stump (ALJ) denied the motion. On February 1, 2002, Ameritech Michigan filed an application for leave to appeal the denial of consolidation. On February 6, 2002, the Staff filed a response noting that the Court had deferred to the Commission, in part, on the basis of an imminent need to resolve safety concerns, but the Staff did not take a position on whether the cases should be consolidated. On February 15, 2002, Detroit Edison filed a response opposing consolidation.

Rule 337 of the Commission's Rules of Practice and Procedure, 1992 AACRS, R 460.17337, establishes the standards for reviewing applications for leave to appeal. Not every application merits immediate review. An appellant must establish one of the following conditions before the Commission will grant review:

1. A decision on the ruling before submission of the full case to the Commission for final decision will materially advance a timely resolution of the proceeding.
2. A decision on the ruling before submission of the full case to the Commission for final decision will prevent substantial harm to the appellant or the public-at-large.

If the Commission grants immediate review, it will reverse an administrative law judge's ruling if the Commission finds that a different result is more appropriate.

Immediate review is appropriate to address the issue of consolidation in these cases, which can be expected to affect a timely resolution of the underlying dispute. Rule 301(5) of the Commission's Rules of Practice and Procedure, R 460.17301(5), permits consolidation. Because both complaints relate to the same parties, factual circumstances, events, and conditions and raise issues of fact, law, and policy that are identical or closely related, the Commission finds that the

cases should be consolidated to promote a just, economical, and expeditious determination of those issues. The ALJ shall set a procedural schedule for the consolidated cases that will expedite a final decision.

A review of the progress in both dockets leaves the impression that neither party has shown sufficient concern to resolve these proceedings expeditiously. Notwithstanding the apparent safety implications of some alleged Code violations, both parties have spent much time and effort pursuing tangential issues. For example, Detroit Edison has filed a number of motions, and Ameritech Michigan waited well over a month after the Court granted summary disposition before invoking the Commission's jurisdiction. Both parties have filed complaints that include implausible theories as bases for relief. These actions undermine any professed concern for public safety. Because the parties have been litigating the dispute for almost a year, consolidating the complaints should not be viewed as an opportunity to contribute to further delay by insisting upon unnecessary additional discovery. The Commission directs the parties to proceed toward an expedited resolution and the ALJ to be diligent in keeping the parties on track.

The Commission FINDS that:

- a. Jurisdiction is pursuant to 1909 PA 106, as amended, MCL 460.551 et seq.; 1919 PA 419, as amended, MCL 460.51 et seq.; 1939 PA 3, as amended, MCL 460.1 et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACS, R 460.17101 et seq.
- b. The application for leave to appeal should be granted.
- c. The two complaint dockets should be consolidated.

THEREFORE, IT IS ORDERED that:

A. Ameritech Michigan's application for leave to appeal from the January 24, 2002 ruling is granted.

B. The complaint dockets are consolidated.

The Commission reserves jurisdiction and may issue further orders as necessary.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ Laura Chappelle
Chairman

(S E A L)

/s/ David A. Svanda
Commissioner

/s/ Robert B. Nelson
Commissioner

By its action of February 25, 2002.

/s/ Dorothy Wideman
Its Executive Secretary

THEREFORE, IT IS ORDERED that:

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Suggested Minute:

“Adopt and issue order dated February 25, 2002 granting the application for leave to appeal filed by Ameritech Michigan and consolidating the complaint dockets, as set forth in the order.”